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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 512

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS AMERICAN INVESTORS FUND, INC. AND CHESTNUTT CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents American Investors Fund, Inc. (the "Fund") and Chestnutt Corporation submit this brief in opposition to the petition of General Time Corporation ("General Time") for a writ of certiorari to review the interlocutory judgment of the Court of Appeals for the Second Circuit entered on July 31, 1968 which reversed the dismissal of the SEC's complaint and remanded the case for further proceedings.

Questions Presented

1. Whether there can be any justiciable issue or any case or controversy in the Constitutional sense where

(a) The seventeen allegations of the Securities and Exchange Commission's ("SEC") complaint* allege no injury to petitioner or its shareholders.

(b) The complaint does not allege that it is on behalf of or for the benefit of petitioner or petitioner's shareholders.

(c) Petitioner's answer** in its entirety is merely an express admission of the allegations in the seventeen paragraphs of the complaint.

(d) Petitioner has made no cross-claim, no counterclaim, nor third party complaint.

(e) The SEC as sole and original plaintiff has not appealed from the District Court's final judgment on remand (entered October 4, 1968, from which final judgment General Time appealed and which appeal was argued November 1, 1968) nor petitioned for certiorari herein with respect to the interlocutory decision.

2. Whether petitioner is a real party in interest as required by Rule 17(a), F.R.Civ.P., where it does not purport to act on behalf of Fund or Fund's shareholders and neither alleges nor shows any injury to itself or its shareholders.

3. Whether it would be an improvident exercise of discretion for this Court to review a case of first impression arising under Section 17(d) of the Investment Com-

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* "Appendix A" hereto.

** "Appendix B" hereto.

pany Act of 1940* (the "Act") where there was no "deliberate flout[ing] of regulatory statutes", where "on the face of things" there had been no damage to any person or protected class, and where it appears remote that comparable or analogous situations will arise again, especially in view of the opinion by the Court of Appeals which for the first time, and clearly, has declared certain activities to be within the jurisdiction of the SEC.

4. Whether the Court of Appeals in an independent suit brought by the SEC under Section 42(e) of the Act was obliged to apply Rule 52(a), F.R.Civ.P., to the facts found by the trial judge after trial without a jury on the basis of evidence before him including oral testimony.

5. Whether the SEC could deliberately violate its own Rule 17d-1 that it *"will* consider" certain matters upon application to it, and then expressly predicate an independent action upon its own refusal to consider these same matters.

6. Whether the Court was required to allow the exact form of relief demanded in the complaint.

7. Whether a court of equity was required to decree forfeiture of voting rights now and in the future, the cancellation of votes previously cast, and the reversal of decisions taken at a shareholders' meeting where there was no deliberate flouting of the regulatory statute, where no decided case had ever applied Section 17(d) to a situation like that here, and "conscientious counsel could well have believed" that the statute was inapplicable.

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* 15 U.S.C. 80a et seq. References herein are to the Act.

8. Whether it was erroneous for the Court of Appeals to sustain the Commission's determination that Section 17(d) of the Act was applicable to the facts, passing over the District Court's contrary determination and the plain language of the statute.

9. Whether Rule 17d-1 was a valid exercise of the Commission's rule-making power, and, if valid, whether it could be applied to the facts.

Statutes Involved

The relevant portions of the Investment Company Act of 1940, 15 U. S. C. §§80a-80a-1, 80a-2(a) (3), 80a-17(d), 80a-42-(e) and Rule 17d-1 (17 CRF 270.17d-1) thereunder are set forth in "Appendix C" to the petition.

Rule 52(a), F.R.Civ.P., is as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement of the Case

On May 1, 1968 the SEC, in a case of first impression, complained that Talley Industries, Inc. ("Industries") and the Fund were violating Section 17(d) of the Act and Rule 17d-1 thereunder in the acquisition and voting of General Time stock, and that both such defendants had violated said Section and Rule by voting their General Time stock at its meeting held April 22, 1968, to be reconvened on May 3, 1968, when the count of votes was to be reported.

There was no claim that any person was injured or was about to be injured. The burden of the complaint* was that Industries and Fund had not obtained prior SEC approval of a joint transaction.

General Time's entire answer** consisted of an admission of the allegations of the complaint. There was no counterclaim, no crossclaim, nor any other cognizable claim by General Time.

The Commission did not allege that the action was brought on behalf of General Time or for its benefit. After an expedited trial the complaint was dismissed as to all defendants. The SEC appealed, and the Court of Appeals reversed and remanded for further proceedings on July 31, 1968, and a final judgment was entered by the District Court October 4, 1968. General Time then appealed from the final judgment on remand, but the Commission did not appeal.

The Court of Appeals heard General Time's appeal from such final judgment November 1, 1968.

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* "Appendix A" hereto.

** "Appendix B" hereto.

In the meantime, General Time on September 12, 1968, petitioned this Court for review of the July 31, 1968 interlocutory decision.

None of the real parties in interest appealed from the final judgment. None of the real parties in interest has petitioned this Court for review of the interlocutory decision.

Section 17(d) and the Rule thereunder prohibit an affiliated person of an investment company from effecting any transaction in which the affiliate and the investment company are joint participants in contravention of rules and regulations the Commission may prescribe for the purpose of limiting or preventing participation by the investment company "on a basis different from or less advantageous than" participation by the affiliate.

The Fund owns approximately 9% of Industries' stock, which made Industries an "affiliate" of the Fund, albeit a downstream affiliate. Section 2(a) 3 of the Act.

The District Court made detailed findings and concluded that there was no violation of the Act and the Rule, which it found were inapplicable. The Court of Appeals did not review the District Court's findings. It reversed and remanded, because it found that the Commission could have construed the statute as it did, and that there was sufficient evidence to support the Commission's determination. On remand the District Court entered an injunction to carry out the objective of the statute by carefully prescribing the time and manner of any sales by Industries of General Time stock, forbidding any consultation or communication between Industries and the Fund, and generally restraining any violation of the section.

While the facts are clearly stated in both opinions below, we nevertheless outline them in view of the inadequate recital in the petition.

In December, 1967, Franz G. Talley, President of Industries, told George A. Chestnutt, Jr., President of the Fund and of Chestnutt Corporation, the Fund's investment adviser, that Industries had bought stock in a certain company which Talley viewed as a possible merger candidate. Talley also said that he had in mind that the Fund might wish to buy stock in the same company. After consultation with counsel, Chestnutt reported that the Fund could follow Talley's suggestion as long as it maintained complete independence in the acquisition of stock, as to how it might vote, and in any disposition thereafter. Talley then named General Time as the Company to which he had referred. Chestnutt studied the company, and then the Fund acquired 210,000 shares of General Time stock at an average cost of $28.49 per share in January and February, 1968. The acquisition was supervised, so that broker allocation of orders could not favor customers other than the Fund, and on at least one occasion Industries agreed to forego allocation of purchases and to accept the most expensive shares.

By February 28, 1968, Industries' holdings in General Time stock aggregated 257,937 shares at an average cost of $36.76 per share. Negotiations between Talley and the management of General Time proved fruitless, and a proxy fight for control of General Time ensued.

On March 25, 1968, SEC's staff advised Industries that its proxy material would not be cleared, unless Industries filed an application for approval of the acquisition of General Time stock by the Fund and by Industries. The SEC

also requested the Fund to file an application. Industries filed such an application, in which the Fund joined, with appropriate disclaimers of the need for doing so.

Following hearings held in mid-April of 1968, the SEC issued a Memorandum Opinion and Order declaring that Industries and the Fund had entered into and carried out a joint arrangement under Section 17(d) of the Act and Rule 17d-1 which required an advance application for approval and that there was "no warrant for granting retroactive approval of the transactions effected in such violation". Accordingly, the application was denied, but no direction was given with respect to the stock acquired or the voting thereof, and the Commission merely asserted continuing jurisdiction over any disposition by Industries of its shares.

On April 22, 1968, the stockholders of General Time met and cast their ballots. The meeting was adjourned to May 3 to permit the count and the certification of the result. General Time admits Industries' slate won.

On May 1, 1968, the SEC brought suit in the District Court to enjoin Industries and the Fund, among other things, from further acquiring General Time stock and to compel each of them to withdraw the votes cast by them at the stockholders' meeting. The District Court dismissed the complaint after trial, holding the Act had not been violated.

The reversal and remand by the Court of Appeals directed further appropriate proceedings consistent with the stated legislative objective of preventing affiliated persons from injuring the interests of registered investment companies emanating from participation in transactions "on

a basis different from or less advantageous than that of such other participant". In this connection the Court noted that it failed to perceive how the interest of the Fund's stockholders would be advanced by requiring the Fund and Industries to withdraw votes cast at the stockholders' meeting, and that such relief would inflict harm, rather than prevent it. Emphasizing the power of a court of conscience to formulate a remedy suitable to specific circumstances and particular situations, the Court also concluded that the facts before it did not warrant penal sanctions such as might be called for in the case of a wilful transgression of regulatory statutes.

REASONS FOR DENYING THE WRIT

Introduction

No case or controversy is presented to this Court. Petitioner claims nothing—not even injury. There is no issue. There is no injury. There is no standing. The petition is without meaning.

No allegation of the SEC's complaint even suggested possible injury to General Time or its stockholders. General Time's answer added nothing to the complaint; it simply admitted all the allegations.

Since there was never any issue of actual or potential harm involving petitioner General Time, it was never a real party in interest. Its presence in the suit was as a nominal party only, having been named in the SEC's complaint solely to prevent the completion of General Time's annual meeting where the votes were cast by both the Fund and its downstream affiliate.

The maintenance of the status quo was not for the benefit of General Time. It was to permit a Court to determine whether shareholders of the Fund were endangered and entitled to Court protection—to see whether there was any possibility that the Fund could be injured through participation in a joint transaction on a basis "less advantageous than or different from" any participation by Industries, the Fund's statutory "affiliate"—downstream.

The District Court affirmatively found that there was ". . . no conceivable way by which Fund can be in any way affected financially by the purchase by Talley of the shares." (Pet. App., 35a)

The Court also found "It is clear that George [Chestnutt] made an independent decision for Fund to buy these shares, believing it to be a good investment for Fund." (Pet. App., 25a) See also Pet. App., 38a.

The Court of Appeals in no way disturbed these findings of the District Court. Instead, it held as a matter of law that the Commission could have construed its regulation and the statute in the manner that it did, and consequently the decision was reversed on the law. In reversing, the Court of Appeals emphasized that there had been no participation by Fund on a basis different from or less advantageous than the participation by Industries. The Court said:

> "On the face of things that has not happened here up to this time, and the objective for a court of equity must be to insure that it does not happen in the future." (Pet. App., 17a)

Thus, the Court of Appeals broadened the scope of the statute in this "close case" of first impression where "con-

scientious counsel" (Pet. App., 18a) could have advised to the contrary, and directed the District Court to enter an appropriate injunction which would prevent harm in the future, which was done October 4, 1968.

Only General Time seeks review here, but neither in its one paragraph pleading, nor anywhere else in the record, nor in its petition has it shown any possibility of past or future injury.

I.

The petition presents no justiciable issue.

No respondent had any dealings with petitioner.

Nothing in the complaint alleged injury to General Time or its shareholders.

Nothing determined by the SEC, nor by the District Court, nor by the Court of Appeals even suggests that General Time or its shareholders had been injured or could possibly be injured by any act or omission of Fund or Industries.

Consequently, there is nothing for the judicial process to act upon. No direction by this Court would confer any benefit or impose any burden upon General Time.

When General Time merely admitted the allegations in the complaint, none of which related to its legal rights or affected its business or property in any way, petitioner at the same time confessed there was no justiciable issue. No issue was adjudicated below with respect to General Time, nor could it have been.

II.

General Time is not a real party in interest and may not prosecute this petition.

The absence of any issue with respect to General Time necessarily means that no interest of General Time can be affected by this Court. Consequently, it is not a real party in interest as required by Rule 17(a), F.R.Civ.P., and it may not petition for certiorari.

III.

In the event that this Court should grant certiorari difficult questions of statutory construction and procedure would have to be determined. These questions are unlikely to recur and are of little public significance.

The immense public importance of the federal securities laws does not require that every decision thereunder should be reviewed by this Court. No matter how surprising a particular opinion may be to the parties involved, there is no occasion for this Court to speak where the unique circumstances are unlikely to recur. Indeed, since this "close question" has for the first time been resolved, all investment companies are now apprised that the Commission will claim jurisdiction where there is little more than the fortuitous investment by an investment company and an affiliate in stock of another corporation. Consequently, there is no occasion for this Court, on the basis of this case of first impression, to examine the question whether the Court of Appeals fixed the boundaries of the Commission's jurisdiction in exactly the right place. The very

fact that the decision below has been rendered by the Court which is called upon to pass upon a very large number of securities law cases makes it unlikely that the issues litigated here will again be litigated by other parties.

IV.

The decision of the District Court was not "clearly erroneous" under Rule 52(a) F.R.Civ.P.

In the event certiorari is granted, these respondents will argue here, as they did below, that the District Judge properly dismissed the complaint, and that his findings of fact were not clearly erroneous and should have been upheld. In simple terms, he found on the basis of oral testimony that there simply was no "joint transaction", and the independent acts of the Fund and Industries, each seeking its own best interests, were not subject to the Act. Moreover, the issues before the District Court were different from the issues in the proceeding on Industries' application filed with the Commission. That application related solely to the *acquisition* of stock. In contrast, the Commission's complaint in the District Court alleged the *voting* of stock to be part of the "joint transaction", and the SEC further contended that a merger was a part of the transaction. Finally, even the parties were different. Chestnutt Corporation was not a party to the proceeding before the Commission on Industries' application, in which Fund had joined.

Thus, when the Commission brought an independent action under Section 42(e) of the Act, we believe it clear that this was a proceeding *de novo,* and the District Court properly treated it as such. Consequently, it was error,

in our view, for the Court of Appeals to reject our arguments as to Rule 52(a) F.R.Civ.P., and look instead to the Commission's determination in a proceeding where the issues were different and the parties not identical. It was urged below, and these respondents would contend here, that the Court of Appeals erroneously permitted the SEC to enter the court as a contestant, and then "bootstrap" its way to an affirmance of their contentions, many of which had not been considered in the administrative proceeding where the parties were not identical.

Since all the real parties in interest, namely, the SEC, Industries and Fund, do not contest the result of the final judgment below, we do not believe that this would be an appropriate case in which to consider these intricate questions.

V.

Rule 17 d-1 is invalid as exceeding the authority of Section 17(d) of the Act and is void in its entirety.

The only authority granted by Congress was to make rules "for the purpose of limiting or preventing participation by [an investment company] on a basis different from or less advantageous than" participation by an affiliate.

The Rule purports to prohibit *all* joint transactions, unless prior approval has been obtained from the Commission, irrespective of whether there is any disadvantage or difference in the participation. Moreover, a variety of additional activities are proscribed beyond the statutory words, including any "joint arrangement", "joint enterprise", or "profit sharing plan". It is submitted that the

Rule is totally invalid as going beyond any possible interpretation of the statute and the authority granted by Congress.

VI.

The findings by both courts compelled a decision that the statute could not have been violated.

It plainly appears that Fund was able to acquire General Time's stock at an average price considerably below the average price which Industries paid. Consequently, there could not have been any violation of the statute; there was no conceivable way in which the Fund could be injured; and the dismissal of the complaint should have been affirmed.

VII.

The Commission could not predicate a suit upon its own failure to act.

The Commission had itself found no possibility of injury to the Fund, reciting the prices at which Fund purchased General Time stock and the prices at which Industries purchased such stock. Thus, the Commission was bound by its own Rule that it "*will* consider" whether any participation was "less advantageous than or different from" to grant the application, in the event that it did not dismiss the application as not required in the circumstances.

VIII.

In Answer to the Particular Points Urged by Petitioner.

(1)

The Petition Is Premature.

(Petition, pp. 7-8)

Petitioner's contention that the present case is in proper posture for review is erroneous. The Court of Appeals remanded the case to the District Court for further appropriate proceedings which have been completed since the filing of the petition herein. It did so in complete agreement with petitioner's contention that the respondent companies had failed to discover that in this "close case" Section 17(d) of the Act could be applied to the facts.

The Court of Appeals did so, also, in full awareness of the plenary power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Only in the Court's refusal to presume malice and base motivation, or injury to anyone at all, did the opinion incite the petitioner's displeasure. Failure so to presume can hardly be equated with the posing of important questions "fundamental to the further conduct of the case" such as might justify interlocutory review. *U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945).

Nor is there anything in the cases cited by the petitioner which would require such a departure from regular procedure. In *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), the question was whether state or federal law controlled the remedy to be granted. It was there held that federal

remedies are always available to an aggrieved party for the protection of federally created rights. Indeed, the Court in *Borak* went on to hold that the particular federal remedy to be applied would have to await a trial on the merits.

Here, the federally created right of Fund shareholders has been protected after trial and after remand by a final injunction. There is no parallel between *Borak* and the the case at bar. There is no disagreement or dispute in the present case as to the extent of equitable power. The sole purported grievance of the present petitioner stems from its gratuitous assumption that the moulding process would, in some unstated manner, fall short of meeting the necessities of the case—to protect Fund shareholders.

Deckert v. *Independence Shares Corp.*, 311 U. S. 282 (1940), like *Borak,* dealt with a question as to the type of relief to be granted (i.e. legal or equitable). In that case also, the Court in holding that equitable relief was justified by the allegations of the bill, went on to state that the right to *all* of the relief prayed for was not then before it for determination.

(2)

The Court of Appeals' Statement of the Purpose of the Act Is Not Inconsistent With Congressional Policy or SEC Interpretations.

(Petition, pp. 8-11)

Although the Court of Appeals found the respondent companies in inadvertent violation of the Act, petitioner advances the argument that the Court's statement of the legislative objective was inconsistent with Congressional

policy and with SEC interpretations. Even assuming, *arguendo*, the validity of the Court's determination, it is difficult to isolate the claimed inconsistency, much less to understand it, when all sides agree that Section 17(d) of the Act aims at the prevention of injury to investment company stockholders by the actions of affiliated persons.

But, we are asked to believe nevertheless that Section 17(d) goes further; that it is designed to protect portfolio companies in the abstract, regardless of their relationship to, or whether they have "transactions" with, registered investment companies. The reason why the type of injury that might be apprehended by a portfolio company is not delineated by petitioner is that there was no "transaction" with petitioner General Time. Ownership by Fund of General Time stock is not a "transaction". Petitioner never pleaded nor claimed that ownership was a "transaction", just as petitioner never pleaded nor pointed to any injury.

Even if it could be assumed that the "protection" of portfolio companies in the abstract is an objective of Section 17(d) of the Act, nothing in this case shows any interest of petitioner which has not been protected.

(3)

The Court of Appeals Did Not Substitute Its Judgment for that of the SEC and Did Not Abrogate Rule 17d-1.

(Petition, pp. 11-14)

Again, without conceding any impropriety on the part of the respondent companies, it is certainly true that the Court of Appeals and the SEC agree that the Act was violated. The SEC besought the District Court under Section 42(e)

for a remedy in an independent suit in equity. Equitable jurisdiction having been invoked, the remedy called for the application of equitable principles. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944). It is elementary, of course, that in equity the shape of the decree is a matter of informed discretion. *Railroad Commission* v. *Pullman Co.*, 321 U. S. 496. Realizing this, the SEC as sole plaintiff never saw fit to seek interlocutory review; likewise it did not appeal the final judgment. Even less should petitioner as a nominal party be heard to complain that equity should not be done after equity has been invoked by someone else.

(4)

The Powers of the SEC Were Not Infringed by the Decision of the Court of Appeals.

(Petition, pp. 14-16)

The final footnote to the SEC's Memorandum Opinion and Order (Petition, 50a) asserts "continuing jurisdiction under Section 17(d) and Rule 17d-1 over any future transfers by Industries of the GTC stock it has acquired in violation of these provisions."

That is the only "ordering" provision by the Commission other than its denial of the application. The Court of Appeals specifically noted these provisions (Petition, 9a) and preserved intact both the denial of the application and the assertion of continuing jurisdiction.

Every power asserted by the Commission was preserved. Nothing was infringed.

Neither the Commission, nor the District Court, nor the Court of Appeals even suggests the possibility of unjust enrichment "at the expense of innocent third parties" or

the existence of "fruits of wrongdoing." (Petition, p. 15) Yet the entire petition is predicated upon these completely unsubstantiated assertions.

Since the SEC's complaint, admitted by petitioner in its entirety, contains no such allegations and there is nothing in the record remotely suggesting injury or potential injury to anyone, failure by the Commission and by two courts to find any injury is conclusive.

These arguments by petitioner are patently absurd. They emphasize that a holdover, incumbent management, admittedly voted out of office, seeks to exploit to its own ends what at most was a fortuitous and inadvertent violation of a statute, which statute and violation are wholly unrelated to the affairs of the corporation these individuals continue to manage (and its treasury to finance litigation) more than half a year after they were discharged.

No case cited by petitioner stands for the proposition that a court of equity should produce mischief, especially at the instance of a party with no interest in a proceeding. Nor is punishment and forfeiture to be countenanced in equity.

In the circumstances of this case, no warrant exists for the treatment of the respondent companies as incorrigible malefactors. As stated in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, at 633:

> "The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States,* 276 U.S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The neces-

> sary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

Similarly, equitable relief is denied as beyond the necessities of the case where circumstances do not amount to deliberate flouting of regulatory statutes. *S.E.C.* v. *Torr,* 87 F. 2d 446 (1937); *S.E.C.* v. *Franklin Atlas Corp.,* 154 Fed. Supp. 395 (1957).

In the *Torr* case, a temporary injunction was held to have been improvidently granted where the Court stated (p. 450):

> "It cannot be justly thought that the accused practices were commenced in disregard of the statute. They were continued for only a little over a month and only while there is evidence that it was for good cause thought that they were not in violation of the law. Until the disputed facts can be tested by a trial, the only justifiable conclusion is that the appellants were making a genuine effort to conform to the law and that negatives an inference that violations, such as they were, had been due to more than mistaken interpretation or would be persisted in after they were called in question. So far as past conduct is concerned, there was, then, no sufficient ground for the preliminary injunction, since it would not support the inference of repetition in the future. Shore v. United States (C.C.A.) 282 F. 857; Blease v. Safety Transit Co. (C.C.A.) 50 F. (2d) 852."

In the present case the Court of Appeals reversed after trial and resolved a "close question." (Petition, 2a) In reversing, the Court was especially careful that its mandate be construed in accordance with this Court's repeated expositions of traditional equity principles. The final two pages of the opinion (Petition, 17a-18a) make clear that no power of the Commission was infringed; rather equity was directed to be done.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

November, 1968

Respectfully submitted,

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APPENDIX A

Complaint

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1782

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

—v.—

TALLEY INDUSTRIES, INC. OF ARIZONA, AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

APPENDICES

1. It appears to the plaintiff, Securities and Exchange Commission ("Commission"), that defendants American Investors Fund, Inc. ("the Fund"), Chestnutt Corporation ("Chestnutt") and Talley Industries, Inc. ("Industries") have been and are now engaged in acts and practices which constitute violations of Section 17(d) of the Investment Company Act of 1940 ("the Act"), 15 U.S.C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. The Commission, pursuant to Section 42(e) of the Act, 15 U.S.C. 80a-41(e), brings this action to enjoin such acts and practices and for other relief.

2. This Court has jurisdiction under Section 44 of the Act, 15 U.S.C. 80a-43.

In the present case, the Court of Appeals reversed after trial and resolved a "close question." (Petition, 2a.) In reversing, the Court was especially careful that its mandate be construed in accordance with this Court's repeated expositions of traditional equity principles. The final two pages of the opinion (Petition, 17a-18a) make clear that no power of the Commission was infringed; rather equity was directed to be done.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

November, 1968

Respectfully submitted,

Clendon H. Lee
120 Broadway
New York, N. Y. 10005
Counsel for Respondents
American Investors Fund, Inc.
and Chestnut Corporation

Stanley L. Sahel
O'Connor & Farber
Of Counsel

APPENDIX A

Complaint

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

1. It appears to the plaintiff, Securities and Exchange Commission ("Commission"), that defendants American Investors Fund, Inc. ("the Fund"), Chestnutt Corporation ("Chestnutt") and Talley Industries, Inc. ("Industries") have been and are now engaged in acts and practices which constitute violations of Section 17(d) of the Investment Company Act of 1940 ("the Act"), 15 U.S.C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. The Commission, pursuant to Section 42(e) of the Act, 15 U.S.C. 80a-41(e), brings this action to enjoin such acts and practices and for other relief.

2. This Court has jurisdiction under Section 44 of the Act, 15 U.S.C. 80a-43.

3. Each of the defendants is an inhabitant of, transacts business in, or may be found in the Southern District of New York. The acts and transactions complained of took place in substantial part within said district.

4. Defendant Fund is a diversified open-end investment company registered under the Act.

5. Defendant Chestnutt is defendant Fund's investment adviser.

6. Defendant Industries is a corporation of which more than 5% of the outstanding voting shares are owned by the defendant Fund and have been at all times mentioned herein.

7. By reason of defendant Fund's ownership of more than 5% of the outstanding common stock of defendant Industries, Industries is an "affiliated person" of the Fund within the meaning of Section 2(a)(3) of the Act, 15 U.S.C. 80a-2(a)(3).

8. Defendant General Time Corporation ("General Time") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Connecticut. Defendant Industries owns 257,937 shares of the common stock of General Time, defendant Fund owns 210,000 shares of the common stock of General Time.

9. On or about December 29, 1967, Franz G. Talley, president of defendant Industries, advised George A. Chestnutt, Jr., president of defendant Fund and of defendant Chestnutt, that Industries was buying the stock of defen-

dant General Time with a view to Industries' effecting a merger with General Time and induced the Fund to enter into a program with Industries to purchase the common stock of General Time through a common broker, M. Kimelman & Co. ("Kimelman"), so that Industries would be in a position to effect a merger with General Time.

10. Pursuant to this program, defendant Industries acquired 257,937 shares of common stock of defendant General Time between December 26, 1967, and February 23, 1968, of which all except 66,437 shares were acquired through Kimelman; and defendant Fund acquired between January 5, 1968, and February 15, 1968, through Kimelman, 210,000 shares of common stock of General Time.

11. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries and defendant Fund have been engaged in a joint transaction looking toward a merger of Industries and General Time.

12. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries has been effecting a transaction or transactions in which defendant Fund is a joint or a joint and several participant with Industries within the meaning of Section 17(d) of the Act and in contravention of Rule 17d-1 thereunder.

13. On March 27, 1968, a joint application was filed with the Commission by defendant Industries and by defendant Fund, seeking an order declaring that certain of their activities, including those set forth in paragraph 10 hereof, were not subject to Section 17(d) of the Act or Rule 17d-1

thereunder or in the alternative, seeking approval, *inter alia,* of those transactions.

14. On April 19, 1968, the Commission, passing upon the joint application, found that the program of defendant Industries and defendant Fund constituted a joint arrangement within the meaning of Section 17(d) of the Act and Rule 17d-1 thereunder; that Industries' acquisition of the shares of defendant General Time had been in violation of the Act; and the Commission refused to grant approval of the joint arrangement. A copy of the Commission's Memorandum Opinion and Order Denying Application (Investment Company Act Release No. 5358) is attached hereto as Exhibit A and made a part hereof.

15. In connection with the Annual Meeting of Shareholders of defendant General Time, scheduled to be held on April 22, 1968, defendant Industries supported a slate of nominees for directors (the Opposition Slate) in opposition to that proposed by the management of General Time and solicited proxies in favor of the Opposition Slate.

16. The Annual Meeting of Shareholders of defendant General Time was held on April 22, 1968, and the votes of its shareholders, including the votes of defendant Industries and defendant Fund, were cast either in person or by proxy. The meeting was adjourned, to be reconvened on May 3, 1968, when the count of the inspectors is scheduled to be presented.

17. Unless restrained and enjoined defendant Industries and defendant Fund will continue to engage in the unlawful acts and practices set forth in this complaint or obtain benefits from the unlawful acts and practices in which the Commission has found that they have been engaged.

WHEREFORE, the Securities and Exchange Commission, plaintiff herein, respectfully demands:

(1) That a temporary restraining order, preliminary injunction and permanent injunction be entered restraining and enjoining defendants Industries, Fund and Chestnutt and each of them, and their directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them from directly or indirectly acquiring, or participating in the acquisition of, any further shares of defendant General Time, or taking any other action, in any transaction in which the Fund is a joint or a joint and several participant with Industries, without first having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having first been granted by order of said Commission.

(2) That the temporary restraining order contain provisions restraining defendant General Time and its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with it from directly or indirectly reconvening the Annual Meeting of Shareholders held on April 22, 1968, or in any manner giving effect to the votes of shareholders cast at such meeting, or holding any other meeting of shareholders of General Time until a preliminary injunction is entered.

(3) That the preliminary and permanent injunctions contain provisions

(a) requiring defendants Industries and Fund to withdraw any votes previously cast at the An-

nual Meeting of Shareholders of defendant General Time held on April 22, 1968, for shares which the Commission found Industries and Fund had acquired pursuant to a joint arrangement and enjoining Industries and Fund from voting any such shares for nominees for directors whose names have been or may be proposed directly or indirectly by or on behalf of Industries or as supporting a merger or consolidation or other combination of General Time with Industries or from voting any such shares for any merger or consolidation or other combination of General Time with Industries at any future meeting of shareholders of General Time;

(b) enjoining defendant Industries from inducing defendant Fund or any other registered investment company of which it is an affiliated person, through such company's investment adviser or otherwise, from entering into any joint transaction with Industries in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(c) enjoining defendant Fund from entering into any other joint transaction with defendant Industries or any other affiliated person in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(d) enjoining defendant Chestnutt from advising, aiding or abetting the defendant Fund or any other registered investment company as to which Chestnutt is an investment adviser to

engage in any joint transaction with any affiliated company in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(c) that should the order of the Commission, dated April 19, 1968, and attached hereto, be reversed or modified, appropriate modification of the preliminary and permanent injunctions will be made.

(4) Such other and further relief as the nature of the case may require and as the Court may deem proper.

Respectfully submitted,

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PHILIP A. LOOMIS, JR.
General Counsel

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DAVID FERBER
Solicitor

.....

EDWARD B. WAGNER
Assistant General Counsel

.....

JANET G. GAMER
Attorney

Securities and Exchange Commission
Washington, D. C. 20549

.....

MAHLON M. FRANKHAUSER
Regional Administrator

.....

RICHARD V. BANDLER
Associate Regional Administrator
Securities and Exchange Commission
New York Regional Office
26 Federal Plaza
New York, N. Y. 10007

May 1, 1968.

APPENDIX B

Answer of Defendant General Time Corporation

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 CIVIL 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, and GENERAL TIME CORPORATION,

Defendants.

Defendant General Time Corporation, by its attorneys, Chadbourne, Parke, Whiteside & Wolff, answers the complaint herein, as follows:

1. Admits each and every allegation contained in paragraphs 1 through 17 of the complaint.

WHEREFORE, defendant General Time Corporation respectfully demands that the relief prayed for in the complaint be granted.

Respectfully submitted,

CHADBOURNE, PARKE, WHITESIDE & WOLFF

BY /s/ PAUL G. PENNOYER, JR.
Paul G. Pennoyer, Jr.
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